UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BUCKLEY OTTO,	:	
Petitioner,	:	
	:	PRISONER
v.	:	Case No. 3:98CV2425
	:	
JOHN J. ARMSTRONG,	:	
Respondent.	:	

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, an inmate confined at the State of Connecticut MacDougall Correctional Institution in Suffield, Connecticut, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the petition is denied.

I. Procedural Background

On April 2, 1996, after a jury trial in the Connecticut Superior Court for the judicial district of Hartford, the petitioner was found guilty of assault in the first degree in violation of Conn. Gen. Stat. § 53a-59(a)(3), interfering with a police officer in violation of Conn. Gen. Stat. § 53a-167a, attempted possession of narcotics in violation of Conn. Gen. Stat. §§ 53a-49(a)(2) and 21a-279(a), and attempted possession of narcotics within 1500 feet of a school in violation of Conn. Gen. Stat. §§ 53a-49(a)(2) and 21a-279(d).[1] On May 20, 1996, he was sentenced to a total effective term of imprisonment of twenty years, execution suspended after twelve years and four months.

The petitioner appealed his conviction to the Connecticut Appellate Court on five

[1]The jury acquitted him of four counts: (1) two counts of assault on a police officer, (2) criminal attempt to commit assault in the first degree, and (3) assault in the second degree.

grounds. He claimed that the trial court erred in the following respects: (1) it should not have excluded evidence that two police officer witnesses had settled injury claims with the petitioner's auto insurer, (2) it improperly instructed the jury regarding first degree assault and possession of narcotics, (3) it improperly concluded that there was sufficient evidence to support his conviction for assault in the first degree and, (5) it violated his constitutional protection against double jeopardy by permitting the petitioner to be convicted of both narcotics charges. See State v. Otto, 717 A.2d 775, 779 (Conn. App. Ct. 1998). The Connecticut Appellate Court affirmed the judgment of conviction.

The petitioner sought certification from the Connecticut Supreme Court to appeal all of the issues raised in the Appellate Court. See Resp't's App. E, Pet'r's Pet. for Cert. to Connecticut Supreme Court. On October 22, 1998, the Connecticut Supreme Court denied certification. See State v. Otto, 719 A.2d 1171 (Conn. 1998).

On December 11, 1998, the petitioner commenced this federal habeas action. He presented in his petition only the first ground presented to both the Connecticut Appellate Court on direct appeal and to the Connecticut Supreme Court in his petition for certification, concerning the insurance settlements. The petitioner filed a brief in support of his petition which essentially reiterates the arguments presented on direct appeal and in his certification petition.

II. Factual Background

Based on the evidence at trial, the Connecticut Appellate Court determined that the jury could have found the following facts:

> This case arises out of a reverse sting operation that the Hartford police department conducted on January 14, 1995, at the Bellevue Square housing

project in Hartford.[2] Officer Reginald Allen posed as a drug dealer while Officers Mark Castagna and David Kardys awaited Allen's signal in a nearby building. Lieutenant Michael Fallon watched the scene from a van on the same street.

At approximately 11:32 a.m., the [petitioner] and a female companion approached Allen in a Chrysler New Yorker. The [petitioner] asked Allen if he "had anything" and said that he wanted heroin. After speaking to his passenger, the [petitioner] told Allen that he wanted five bags of heroin. The [petitioner] had money in his hand.

At that point, Allen signalled the other officers and identified himself to the [petitioner] as a police officer. The [petitioner] said "Oh, shit," and the passenger said, "go, go, go." The [petitioner] then sped down the street.

Castagna and Kardys appeared, identified themselves as police officers and ordered the [petitioner] to stop. Both officers were wearing clothing clearly identifying them as police officers.[3] Castagna drew his gun as he ordered the car to stop. The [petitioner] veered his car onto the sidewalk, hitting Castagna and Kardys.

As the [petitioner] continued down the street, Fallon blocked the [petitioner's] car with his vehicle. Kardys, Allen, and Fallon surrounded the car, identified themselves as police officers, and ordered the [petitioner] to shut off the engine and get out of the car. When the [petitioner] did not comply, the officers forcibly removed the [petitioner] from the car and arrested him. The officers then arrested the [petitioner's] companion.

Otto, 717 A.2d at 779.

After the incident, Police Officers Castagna and Kardys filed civil actions against the petitioner to recover for their injuries. The petitioner's automobile insurer settled both claims. As part of the settlement, each officer signed a release of liability which referred to the incident as an

---

[2] "In a reverse sting, undercover police officers target purchasers of drugs by posing as sellers." Otto, 717 A.2d at 779 n.5.

[3] "Kardys wore a blue jacket with a badge insignia on the front breast and the words 'Crime Suppression' on the back. Castagna wore a blue jersey with a golden badge insignia and the words 'Hartford Police' on the front." Otto, 717 A.2d at 779 n.6.

"accident or occurrence."[4]

III. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), significantly amended 28 U.S.C. §§ 2244, 2253, 2254, and 2255. The amendments "place[] a new constraint" on the ability of a federal court to grant habeas corpus relief to a state prisoner with respect to claims adjudicated on the merits in state court. Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1523 (2000) (opinion of O'Connor, J). Under the AEDPA,

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Under this standard, the court first must decide whether the petitioner "'seeks to apply a rule of law that was clearly established at the time his state-court conviction became final.'" Lurie

---

[4]Although defense counsel at trial indicated that the basis of the claims was negligence rather than an intentional tort, the petitioner has not provided the relevant documents. Thus, the court cannot ascertain whether the action against the insurer was based solely on negligence or whether negligence was one of several theories of liability. However, it appears from an offer of proof on the expected testimony of defense witness Ursula Peters, an adjuster for the insurance company, that it settled the case on the theory that the petitioner negligently struck the police officers with his car. See Resp't's App. H, Transcript of Mar. 22, 1996, at 423-27.

v. Wittner, 228 F.3d 113, 125 (2d Cir. 2000) (quoting Williams, 120 S. Ct. at 1511). Federal law is clearly established if it may be found in holdings, not dicta, of the Supreme Court as of the date of the relevant state court decision. See id. (citing Williams, 120 S. Ct. at 1523). If the federal law the petitioner seeks to apply is clearly established, the court then must "decide whether the challenged ruling of the state trial court was contrary to such federal law or an unreasonable application of it." Id. at 127 (quotations omitted). A decision is "contrary to" existing Supreme Court precedent "(i) when it applies a rule of law 'that contradicts the governing law set forth in' the Supreme Court's cases . . . , or (ii) when it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent.'" Id. (quoting Williams, 120 S. Ct. at 1519-20). A state court decision is an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams, 120 S. Ct. at 1523.

When reviewing a habeas petition under the standards set forth in the AEDPA, the federal court presumes that the factual determinations of the state court are correct. The petitioner has the burden of rebutting that presumption by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1); see also Houchin v. Zavaras, 107 F.3d 1465, 1470 (10th Cir. 1997) (AEDPA increases deference afforded state court factual determinations); Ford v. Ahitow, 104 F.3d 926, 935 (7th Cir. 1997) (AEDPA requires federal courts to give greater deference to state court determinations than they were required to do prior to the amendment of § 2254). Moreover, collateral review of a conviction is not merely a "rerun of the direct appeal." Lee v. McCaughtry,

933 F.2d 536, 538 (7th Cir.), cert. denied, 502 U.S. 895 (1991). Thus, "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." Brecht v. Abrahamson, 507 U.S. 619, 634 (1993) (citations and internal quotation marks omitted).

IV. Discussion

A. Petitioner's Claims

The petitioner contends that he "was denied Due Process and the right to present a defense to criminal charges when the trial judge excluded relevant, and admissible evidence proffered by the defense which would have tended to counter police officers perjurious testimony on cross examination." The Court assumes that this is the same issue which was phrased in the petition for certification to the Connecticut Supreme Court as:

> I(a) Whether, pursuant to state evidentiary law, when a witness testifies at trial that he thought the defendant intentionally hit or tried to hit him with the defendant's car, the witness' prior settlement of a claim against the defendant on a negligence basis for the very same alleged act is a sufficiently inconsistent difference in position as to be admissible under the prior inconsistent statement or conduct doctrine?
>
> I(b) Whether defendant's state and federal constitutional rights to confront adverse witnesses and present defense evidence were implicated and infringed upon by the trial court's ruling on this issue?

Resp't's App. E at 1.[5] With respect to the federal issues, it appears that the petitioner is claiming that the trial judge should have permitted more extensive cross examination of the police officers concerning the settlement of their civil claims against the petitioner arising from the incident

[5]To the extent that the petitioner raises a state law claim, it is not reviewable here.

leading to his arrest.[6] In other words, the petitioner claims that the officers' agreement to settle the injury claims with the petitioner's auto insurer on the basis of negligence is inconsistent with the intent necessary to be proved in the criminal case against the defendant. The petitioner argues that this information, if brought to the attention of the jury, would have led to his acquittal or at least should have been considered by the jury.[7]

B. Applicability of the AEDPA

In Otto, the Connecticut Appellate Court analyzed the petitioner's claim as a challenge to the trial court's exercise of discretion in limiting cross-examination as to credibility:

---

[6]The Court notes that the respondent has raised the possibility of a second ground in support of the petition. The petitioner states that the Hartford Police Department had access to but failed to use equipment which would have recorded the conversation between the petitioner and the undercover officer. He states that this "fact" supports his characterization of the case as "a reverse sting gone awry." This Court notes that the record does not indicate that the petitioner has raised this argument in any state court proceeding. Because the petitioner specifically states that he has presented the issues raised in his petition to the Connecticut Appellate and Supreme Courts, this Court views the petitioner's statements as a characterization of his case rather that a separate ground for habeas relief. Moreover, even if the petitioner intended for this Court to review this issue, he has not exhausted his remedies with respect to it.

In addition, the petitioner has filed a "Response to Memorandum of Law in Opposition to Petition for a Writ of Habeas Corpus," a "Motion to Dismiss the Above Case," and a "Motion to Correct Motion to Dismiss the Above Case Should Read to Dismiss Original Conviction Trial Dated March 11 though April 2, 2000." In these documents, the petitioner refers to inconsistencies between the testimony of Officers Castagna and Kardys at his 1996 trial and a 1995 hearing in state court. The petitioner was represented by the same attorney at the 1995 hearing and his 1996 trial. Based upon its review of the trial transcripts, the court notes that defense counsel did not challenge the testimony of Officers Castagna and Kardys based upon their previous testimony. In addition, based upon the record, it appears that this claim has not been presented to the state appellate courts. Because the petitioner has not exhausted his state court remedies with regard to this claim and has not sought leave to file an amended petition to add the claim, this Court does not consider in this ruling any purported discrepancy between hearing and trial testimony.

[7]Because the facts regarding this claim are not disputed by the parties, the court concludes that no evidentiary hearing is required in this case.

The right to confrontation, which includes the right to cross-examine adverse witnesses, is guaranteed by the sixth and fourteenth amendments of the United States constitution and by article one, § 8, of the Connecticut constitution, but it is not an absolute and unbounded right. State v. Thompson, 191 Conn. 146, 463 A.2d 611 (1983). A court may, in the exercise of its discretion, limit the extent of cross-examination, especially with respect to credibility. C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 3.4.3, pp. 43-44. We traditionally apply a two part analysis to determine whether a party has been deprived of effective cross-examination. "First, we determine whether the defendant received the minimum opportunity for cross-examination of adverse witnesses required by the constitution. . . . If so, we then consider whether the trial court's restriction of cross-examination amounted to an abuse of discretion under the rules of evidence. . . . To establish an abuse of discretion, [the defendant] must show that the restrictions imposed upon the cross-examination were clearly prejudicial. . . . If, however, the defendant is denied the right of effective cross-examination, there would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." (Citations omitted; internal quotation marks omitted). State v. Plaskonka, 22 Conn. App. 207, 214, 577 A.2d 729, cert denied, 216 Conn. 812, 580 A.2d 65 (1990).

As to the first part, the [petitioner] does not assert that he was denied the minimum opportunity for cross-examining the witnesses. Although the [petitioner] largely limited his cross-examination of Castagna to the settlement issue, the [petitioner] cross-examined Kardys more widely with no restriction from the court except as to the settlement issue.

Contrary to the [petitioner's] assertions, the trial court's decision did not unduly restrict the [petitioner's] questioning so as to violate his right effectively to cross-examine the witnesses against him or to present a defense. Effective cross-examination does not include eliciting or presenting evidence that is immaterial or irrelevant. See State v. Barnes, 232 Conn. 740, 746, 657 A.2d 611 (1995). When the trial court properly excludes evidence as irrelevant, it does not abuse its discretion in limiting cross-examination as to the excluded evidence. See State v. Barrett, 43 Conn. App. 667, 676-677, 685 A.2d 677 (1996), cert. denied, 240 Conn. 923, 692 A.2d 819 (1997).

On cross-examination, Castagna testified that the [petitioner] intentionally hit him with his car. Prior to his court appearance, Castagna had settled a personal injury claim with the [petitioner's] insurer pursuant to a policy that excludes intentional torts from its coverage. At trial, the [petitioner] asserted that the settlement constituted conduct equivalent to a prior inconsistent statement and sought to impeach Castagna by eliciting testimony and introducing extrinsic evidence in the form of a signed general release of liability. The [petitioner] also wanted to

introduce similar evidence with respect to Kardys. The trial court limited the cross-examination about the settlement and excluded the extrinsic evidence.[8]

---

[8]"The exchange at trial was as follows:

'[Defense Counsel]: Your Honor, he's received a settlement for personal injuries for an accident or occurrence. Now that he's testified that this is an intentional act, that he was run down, I think I should be allowed to ascertain if in fact he signed a release. I don't know about the money. It's not necessary for me to get the amount of the money in the settlement, but I think I should be allowed to ask him if he didn't sign a piece of paper or release involving this case in which he signed a paper for an accident or occurrence. It's a tacit admission, Your Honor, is what it is.
'The Court: Admission of what?
'[Defense Counsel]: It's a tacit admission of what he's testifying here today, that he was assaulted, that there's other indicia that he's received money for negligence.
'[Assistant State's Attorney]: I would object, Your Honor. First of all, I do not believe that what counsel's talking about constitutes an admission. Number two, I do not think that's relevant.
'[Defense Counsel]: Well, Your Honor, I've looked at 408 of the federal rules. Obviously offers of settlement or compromise are not allowable. However, to show bias, prejudice--
'The Court: How would the fact that he's already had his settlement show bias and prejudice? . . . He's already participated, received--you think that because he's received it it's an ongoing prejudice?
'[Defense Counsel]: Your Honor, when the defendant was charged with assault, an intentional act, this witness made claims under negligence.
'The Court: So?
'[Defense Counsel]: So they're in contrast, Your Honor.
'The Court: Contrast to what?
'[Defense Counsel]: He's saying this is an intentional act, Your Honor. His testimony, Your Honor, since it's cross-examination I should be allowed to impeach him. How far that impeachment goes--I would agree that I don't think I should be able to put in the amounts.
'The Court: And I'll listen to the state's position. But you can ask him if he's been involved in an insurance settlement over this matter. If the answer's yes, you're out of there.
'[Defense Counsel]: I'd like to ask the words on the release, Your Honor. That is, for an accident or occurrence that he signed off on. I don't necessarily need the money, because I don't think that's relevant.
'[Assistant State's Attorney]: I would object. I believe the only relevant thing that counsel can ask is did you make a claim and was there a settlement of that claim.
'The Court: That's exactly right. And that's all I'm going to allow you. . . . You can have an exception. Did you make a claim and was there a settlement offer? As far as--you know one of the points on the record . . . is this officer does not have any control over which statute the state prosecution brings. . . . So I'll restrict the questions to did you file a claim in this particular matter and was that matter settled.'"

> The trial court's ruling was proper because the settlement evidence was not relevant to impeach Castagna and Kardys. A defendant may introduce prior inconsistent statements to impeach a witness. See State v. Keating, 151 Conn. 592, 597, 200 A.2d 724 (1964), cert. denied sub nom. Joseph v. Connecticut, 379 U.S. 963, 85 S.Ct. 654, 13 L.Ed.2d 557 (1965); C. Tait & J. LaPlante, supra, § 7.24.3, p. 207. The trial court must determine, however, whether the statement or conduct is, in fact, sufficiently contrary to the position asserted at trial to justify its introduction as a prior inconsistent statement. State v. Piskorski, 177 Conn. 677, 710, 419 A.2d 866, cert. denied, 444 U.S. 935, 100 S.Ct. 283, 62 L.Ed.2d 194 (1979).
>
> The relevancy issue, therefore, hinges on whether the mere settlement of a potential tort claim permits the imputation to a settling party of a position sufficient to constitute an inconsistent statement. Specifically, the [petitioner] argues that by settling civil claims where intentionality would bar recovery, Castagna and Kardys essentially admitted that the [petitioner] did not act intentionally. We do not agree.
>
> Signing a general release of liability does not necessarily constitute an assertion of any particular theory of liability. That the insurer settled the claims on a negligence basis does not necessarily lead to the conclusion that this representation was made to the insurer or that the witnesses' counsel in those matters did not present alternate theories. A prior inconsistent statement must be "sufficiently inconsistent." State v. Piskorski, supra, 177 Conn. at 711, 419 A.2d 866. On the basis of the facts and assertions in the record here, we cannot find that the trial court abused its discretion in excluding this evidence.
>
> Moreover, the settlement does not serve as an indicia of financial incentive, motive, or bias. Neither Castagna nor Kardys had any personal interest in the outcome of the criminal trial. Although a pending claim or civil suit by one of the witnesses might suggest evidence of bias or interest because the outcome of the criminal trial would bear directly on the success of the civil action, there was no such pending action here.

Otto, 717 A.2d at 780-81 (citations and footnote omitted).

The standards set forth in the AEDPA only apply "with respect to any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). In other words,

---

Otto, 717 A.2d at 780 n.7.

state court decisions adjudicating federal claims are afforded deference under the AEDPA "when state courts either discuss or at least cite controlling Supreme Court case law or state court decisions which refer to appropriate federal law." Washington v. Schriver, 2001 WL 12841, No. 00-2195, *7 (2d Cir. Jan. 5, 2001).[9] Here, the state appellate court relied on state evidentiary law in discussing the merits of Mr. Otto's claims. However, it also referred to the right to confrontation guaranteed by the sixth and fourteenth amendments to the U.S. Constitution. In addition, the state law relied upon by the court applies the federal law relevant to Mr. Otto's claims.[10] See id. Thus, these claims have been adjudicated on the merits for the purposes of the AEDPA.[11]

C. Analysis under the AEDPA

1. Clearly Established Law

---

[9]The AEDPA also applies to this case because Mr. Otto's petition was filed on December 11, 1998 and thus postdates the AEDPA.

[10]For example, in State v. Barrett, 685 A.2d at 686, the Connecticut Supreme Court discussed the scope of defendant's right to cross-examination in the context of the rule set forth in Chambers v. Mississippi, 410 U.S. 284, 295 (1973), which balances this right against the trial court's discretion against the defendant's constitutional rights. For a discussion of the federal law relating to cross-examination, see Section III.C.1.

[11]The state appellate court did not specifically address the petitioner's due process claims. However, the analysis of these due process claims would be similar to the court's discussion of right to cross-examination, see, e.g., Chambers, 410 U.S. at 294-95 (discussing the right to cross-examine witnesses in the context of the petitioner's due process claims), because the right to be confronted with the witnesses against him is one of the rights that is "part of the 'due process of law' that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States." Faretta v. California, 422 U.S. 806, 818 (1975). "[T]o deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." Pointer v. Texas, 380 U.S. 400, 405 (1965). Given this relationship, the fact that the appellate court extensively discussed the petitioner's confrontation rights indicates that it also considered the due process implications of his claims. As a result, those claims were adequately addressed for the purposes of analysis under the AEDPA.

Once it is apparent that the AEDPA applies, the court must determine whether the petitioner seeks to apply a rule of law that was clearly established at the time his state court conviction became final. See Lurie, 228 F.3d at 125. Here, by claiming that his defense attorney should have had a more extensive opportunity to cross-examine the police officers about the nature of their settlement with his insurance company, the petitioner invokes his right to confrontation under the Confrontation Clause of the Sixth Amendment, applicable to the states through the Fourteenth Amendment. See Pointer v. Texas, 380 U.S. 400 (1965). The Confrontation Clause guarantees the defendant in a criminal prosecution the right to confront the witnesses against him. See Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986). This guarantee "means more than being allowed to confront the witness physically," as "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." Davis v. Alaska, 415 U.S. 308, 315-16 (1974) (quotation omitted). This includes the opportunity to show that a witness is biased or that his testimony is exaggerated or unbelievable. See United States v. Abel, 469 U.S. 45, 50 (1984); accord Davis at 316-17 ("the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination"). In addition, "[t]he rights to confront and cross-examine witnesses . . . have long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

However, the opportunity for cross-examination does not require "cross examination that is effective in whatever way, and to whatever extent the defense might wish." Van Arsdale, 475 U.S. at 679 (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam)). The right to confrontation "may, in appropriate cases, bow to accommodate other legitimate interests in the

criminal trial process." Chambers, 410 U.S. at 294. In particular, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Van Arsdale, 475 U.S. at 679.

These principles amount to clearly established law, as they are found in holdings, not dicta, of the Supreme Court as of the date of the relevant state court decision. See Lurie, 228 F.3d at 125 (citing Williams, 120 S. Ct. at 1523).

2. Petitioner's Opportunities for Cross-Examination

If the federal law the petitioner seeks to apply is clearly established, the court then must determine whether the challenged ruling of the state court was contrary to federal law or an unreasonable application of it. See id. at 127 (quotations omitted). The petitioner contends that the trial court improperly precluded him from cross-examining police officers Castagna and Kardys on their settlements with the petitioner's insurance company and excluded extrinsic evidence of those settlements. He argues that the exclusion of this impeachment evidence deprived him of his constitutional rights to confrontation and due process. A review of the record, however, reveals that the petitioner was afforded the opportunity to impeach the credibility of these witnesses, and that the ruling of the state appellate court was neither contrary to federal law or an unreasonable application of it.

First, a state court decision is contrary to established federal law, "(i) when it applies a rule of law 'that contradicts the governing law set forth in' the Supreme Court's cases . . . , or (ii) when it 'confronts a set of facts that are materially indistinguishable from a decision of [the

Supreme] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent." Lurie, 228 F.3d at 127 (quoting Williams, 120 S. Ct. at 1519-20). Here, as explained above, the state appellate court applied state law that followed federal precedents established by the rulings of the Supreme Court. Under both state and federal law, a defendant's right to confrontation is not unlimited; trial judges are permitted to exercise their discretion in restricting cross-examination, especially about topics of little or no relevance. See, e.g., Van Arsdale, 475 U.S. at 679, Barrett, 685 A.2d at 686. Further, it does not appear as though there is any governing Supreme Court precedent that confronts a set of facts that is materially indistinguishable from those at issue here. Thus, the state court's decision is not contrary to established federal law.

The court next turns to the second inquiry required under the AEDPA: whether the state court decision is an unreasonable application of clearly established federal law. A state court decision is an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams, 120 S. Ct. at 1523. Here, the court's application of federal principles to the facts of Mr. Otto's case was not unreasonable, as he was afforded the opportunity to confront and cross-examine the witnesses who testified against him, and in particular, he conducted an extensive cross-examination of Officer Kardys.

As an initial matter, much of the testimony of Officers Castagna and Kardys was not contested. They stated that they observed the petitioner drive up to the undercover officer posing as a drug dealer and speak to him, they exited the building that served as their observation post

upon seeing the undercover officer's signal, and approached the petitioner to place him under arrest. The petitioner then drove onto the sidewalk and struck them with his car as he drove past. See Resp't's App. H at 186-97, 210-22. Similarly, the petitioner testified that he drove up to and had a conversation with the undercover police officer, attempted to flee the scene, and drove onto the sidewalk while doing so. Although he stated that he did not remember striking the officers with his car, he did not deny doing so. See id. at 373-74, 376.

Moreover, the petitioner was permitted to cross-examine these police officers extensively about the events leading to the petitioner's arrest. For example, the petitioner's attorney asked Officer Castagna whether he was able to see the person who was driving the car that hit him, what kind of uniform he was wearing at the time of the incident, and whether his gun was drawn before he was hit by the car. See id. at 197. The petitioner's attorney asked similar questions of Officer Kardys, and further inquired as to a delay in writing the police report of the incident and to the manner in which the petitioner was removed from his car after the incident. See id. at 228-33. In addition, defense counsel asked each officer if he thought that the petitioner intended to hit him with his car and both of the officers responded affirmatively. See id. at 228-41. The petitioner also introduced the fact that they had settled claims with the petitioner's insurer, and that they had received compensation for those claims. See id. at 205, 232-33.

The trial court did not, however, permit further questioning about the nature of the insurance settlements. Although he did not seek to elicit testimony regarding the amount of the settlement, defense counsel attempted to ask the officers about whether they had releases saying that the incident was an "accident or occurrence." See id. at 198-202. As he argued to the

court,[12] defense counsel sought to use these releases to impeach the officers' testimony that the petitioner intentionally hit them with his car. See id. As the Connecticut Appellate Court noted, however, this testimony would not necessarily have shown that the officers were biased, unbelievable, or that they lacked credibility. While cross-examination may include impeachment by prior inconsistent statements, "the court must be persuaded that the statements are indeed inconsistent." United States v. Hale, 422 U.S. 171, 176 (1975). Rather, such releases are the typical conclusion to insurance claims negotiations. Their principal purpose is to bar subsequent claims, not to establish the views of the claimants as to the scienter of the tortfeasor.

Although the opportunity for cross-examination includes the opportunity to show that a witness is biased or that his testimony is exaggerated or unbelievable, see Abel, 469 U.S. at 50, it does not require cross examination that is effective in whatever way, and to whatever extent, the defense chooses. See Van Arsdale, 475 U.S. at 679. Here, defense counsel was permitted to cross-examine extensively Officers Castagna and Kardys regarding the events leading up to Mr. Otto's arrest, and thus had an opportunity to show they were biased and that their testimony was exaggerated or unbelievable. See Abel, 469 U.S. at 50. As a result, the appellate court's decision regarding the limitation of the scope of the petitioner's attorney's cross-examination was not contrary to established law or an unreasonable application of it. The trial court reasonably determined that the evidence of the insurance settlements was not relevant, and based on this determination, excluded it from cross-examination.

D. Harmless Error Analysis

Even if the trial court improperly limited the petitioner's opportunity for cross-

[12]The jury was not present at this time.

examination, thus affecting the jury's perception of the credibility of the two officers, any such error was harmless.

1. Applicable Law

When a habeas corpus petition alleges constitutional error, the court undertakes "a four-step process wherein a court must consider 'the type of error, the harmless error standard to be applied, the degree of certainty required for finding an error harmless, [and] the methodology for determining if the constitutional error is harmless.'" Morillo v. Crinder, No. 97 CIV. 3194(SAS), 1997 WL 724656, at *2 n.4 (S.D.N.Y. Nov. 18, 1997) (quoting Peck v. United States, 106 F.3d 450, 454 (2d Cir. 1997)); see also United States v. Santopietro, 166 F. 3d 88, 94-95 (2d Cir. 1999) (applying harmless error standard to alleged error in federal prosecution regarding jury instruction without first determining that error occurred). But see Morillo, 1997 WL 724656, at *2 (noting that if any error had occurred in state prosecution, it would have been a trial error subject to harmless error analysis, but proceeding to determine that no constitutional rights of the petitioner had been violated). For purposes of this analysis, the court assumes the existence of federal constitutional error and proceeds to determine the type of error alleged.

"The first task for a court in deciding a case involving a federal constitutional error is to determine whether the error is 'structural error' or 'trial error.'" Peck, 106 F.3d at 454 (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)). A structural error is a fundamental defect affecting the entire trial, such as the complete denial of counsel or a biased judge, while a trial error is an error in the trial process itself. See id. "[T]he determination whether an error is structural turns not so much on the particular rule violated, as on whether the error was of sufficient consequence that the criminal process cannot reliably serve its function as a vehicle for

determination of guilt or innocence." Id. (quoting Fulminante, 499 U.S. at 310) (internal quotation marks omitted).

If the court determines that an error rises to the level of structural error, the inquiry is complete and reversal is required. If, however, the court determines that the error is trial error, it must then engage in a harmless error analysis. See id. "[T]he applicable harmless error standard for constitutional error differs depending on the procedural posture of the case." Id. On collateral review of claims of constitutional error, the appropriate standard is "whether the error '"had substantial and injurious effect or influence in determining the jury's verdict."'" Id. (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)). The "reviewing court should grant relief if it is in 'grave doubt as to the harmlessness' of a constitutional error." Id. (quoting O'Neal v. McAnnich, 513 U.S. 432, 445 (1995)). "A judge is in 'grave doubt' when 'the matter is so evenly balanced that [the judge] feels himself in virtual equipose as to the harmlessness of the error.'" Id. (quoting O'Neal, 513 U.S. at 435).

In conducting a Confrontation Clause harmless error analysis, the court considers five factors: (1) the importance of the testimony to the prosecutor's case, (2) whether the testimony was cumulative, (3) the existence of corroborating or contradicting evidence on the record, (4) the ability to cross-examine the witness on other areas and the extent of such cross-examination and (5) the effect of the testimony on the criminal defendant's guilt. See Van Arsdall, 475 U.S. at 684. A Confrontation Clause error is harmless if, "assuming that the damaging potential of the [testimony] were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Van Arsdall at 684; see also United States v. Forrester, 60 F.3d 52, 64 (2d Cir. 1995) ("Error is harmless if it is 'highly probable' that it did not contribute to

the verdict."); United States v. Diallo, 40 F.3d 32, 35 (2d Cir. 1994) ("'Any error . . . which does not affect substantial rights shall be disregarded.") (citation omitted)).

2. Harmless Error in this Case

At trial, the petitioner was found not guilty of two counts of assault on a police officer, one count of criminal attempt to commit assault in the first degree, and one count of assault in the second degree. See Resp't's App. A, Judgment at 15-16. A finding of guilty with respect to these counts would have required the jury to find that the petitioner intentionally assaulted Officers Castagna and Kardys. See Resp't's App. A, Amended Substitute Information at 9-11. In contrast, the assault charge for which the jury actually returned a finding of guilty (assault in the first degree) required the jury to find that the petitioner acted either intentionally *or recklessly*.[13] The fact that the jury found the petitioner not guilty of the intentional assault claims

[13]Although the petitioner was found guilty of the third count of the amended substitute information, assault in the first degree, the court notes that the amended substitute information charged:

And the said Assistant State's Attorney further accuses the said **BUCKLEY OTTO** of the crime of **ASSAULT IN THE FIRST DEGREE** and alleges that on or about January 15, 1995, at approximately 11:32 a.m., at or near 66 Bellevue Square in the City of Hartford, the said **BUCKLEY OTTO**:

> with the intent to cause serious physical harm to one **Mark Castagna**, caused such injury to said person by means of a dangerous instrument, specifically an automobile, in violation of § 53a-59(a)(1) of the Connecticut General Statutes; or in the alternative:
> under circumstances evincing an extreme indifferent (sic) to human life, recklessly engaged in conduct which created a risk of death to another person, specifically one **Mark Castagna**, and thereby caused serious physical injury to the said **Mark Castagna**, in violation of § 53a-59(a)(3) of the Connecticut General Statutes.

Resp't's App. A at 8-9.

indicates that they found the petitioner guilty of reckless as opposed to intentional misconduct. This suggests that the jury found that the petitioner acted recklessly, rather than intentionally, in striking the officers. As a result, the evidence of the insurance settlements to show lack of intent was not necessary–the jury arrived at this conclusion without it. Because the excluded evidence went only to the intent element of the crimes and the petitioner was found not guilty of those charges, any possible error relating to the limitation of their cross-examination was harmless.[14] See Laboy v. Demskie, 947 F. Supp. 733, 742 (S.D.N.Y. 1996) ("Not all erroneous evidentiary rulings rise to the level of constitutional error sufficient to warrant the issuance of a writ of habeas corpus. . . . Constitutional error occurs only in the rare case where the trial court excludes material evidence that would have created a reasonable doubt that did not otherwise exist.")(citations omitted). Because the petitioner has not demonstrated that the trial court's decision had a "substantial and injurious effect or influence in determining the jury's verdict," Brecht, 507 U.S. at 637, federal habeas corpus relief is not warranted on this claim. See, e.g., Laboy, 974 F. Supp. at 742 (holding that failure to admit witness' statement to police in which she did not identify defendant as shooter was harmless error where defense had "ample opportunity" to effectively cross-examine witness and impeach her credibility in other ways). But see Harper v. Kelly, 916 F.2d 54, 57-58 (2d Cir. 1990) (holding that failure of trial court to permit inquiry into emotional state of victim was not harmless error where victim identification was key evidence used to convict defendant); Woods v. Kuhlmann, 677 F. Supp. 1302, 1308-09 (S.D.N.Y. 1988) (holding that failure to permit defense to inquire into reasons why police officer

[14]The jury's finding of recklessness may still be inconsistent with an "accident or occurrence," but it lessens–even more–the relevance of the proffered evidence to the intent elements of the offenses charged.

arrested defendant violated right to confrontation because conduct of arresting officers at time of arrest relevant to jurors' assessment of their credibility and may have resulted in different verdict).[15]

The petitioner also argues that limiting cross-examination on this issue affected the jury's consideration of the other charges, contending that this impeachment evidence would have been so persuasive that the jury would not have credited any statements made by officers Castagna and Kardys. However, the testimony of two other police officers, Officer Allen and Lieutenant Fallon, corroborated the statements of Castagna and Kardys and the excluded information cannot be viewed as so convincing of the lack of credibility of Castagna and Kardys so that it would have convinced the jury not to believe any of their testimony.

Officer Allen, who was the undercover officer who approached Otto's car, testified about the defendant's attempt to purchase heroin from him. He also testified that when he identified himself to Otto as a police officer, Otto "sped off" onto the sidewalk, first hitting Officer Castagna with the car and then Officer Kardys, who dove out of its way as it continued on the sidewalk. See Resp't's App. H. at 123-30. Lieutenant Fallon, who was in the van observing Officer Allen and Otto, testified that he saw Allen and Otto speak, and that he responded once he

---

[15]The Court also notes that on direct appeal and in his amended brief, which reiterates the arguments presented on direct appeal, the petitioner contends that the proper inquiry is not the impact of the purported error on the trial as a whole but on the individual witness. The petitioner cites Van Arsdall to support this contention. In Van Arsdall, the court disagreed with the argument that a criminal defendant cannot state a Confrontation Clause claim unless the jury returned an inaccurate guilty verdict. "It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to 'confront[ation]' because use of the right would not have affected the jury's verdict." 475 U.S. at 680. The court held, however, that a Confrontation Clause claim is subject to harmless error analysis. See id. at 684.

had seen Officer Allen give the signal that Otto had attempted to purchase heroin. He testified that he then observed Otto's car accelerate up onto the sidewalk, striking Castagna, and that he saw Officer Kardys attempt unsuccessfully to get out of the way of the car. Fallon then testified that, after striking Officers Castagna and Kardys, Otto's car attempted to drive around his van (which was positioned to block it), and when the car became stuck, Otto tried to "rock" it free. According to Fallon, Otto continued his efforts to reverse the car and escape even when the officers managed to break the driver's side window and grab Otto. Id. at 249-54.

The testimony of Lieutenant Fallon and Officer Allen shows the overwhelming evidence of Otto's guilt for all four counts of conviction apart from the testimony of Officers Castagna and Kardys. As a result, and also considering the limited relevance of the excluded impeachment evidence, the Court finds that the trial court's failure to permit evidence of the insurance settlement constituted harmless error.

V. Conclusion

The Court concludes that the Connecticut Appellate Court's determination that the exclusion of the evidence of the insurance settlement by the trial court on the ground that it was not relevant to the jury's determination whether the petitioner has the requisite intent to commit the crime of assault, was harmless error even if not correct, and was not "an unreasonable application of" federal law regarding a criminal defendant's rights under the Confrontation Clause. Thus, the petition for a writ of habeas corpus is denied.

The petition for a writ of habeas corpus [Doc. #2] is DENIED. In addition, the petitioner's Motion to Dismiss the Above Case [Doc. #19] and Motion to Correct Motion to Dismiss the Above Case Should Read to Dismiss Original Conviction Trial Dated March 11

through April 2, 2000 [Doc. #18] are DENIED. The petitioner's Order for Compliance [Doc. #21], Motion for Release of Petitioner [Doc. #22] and Motion for Default for Failure to Plead [Doc. #20] also are DENIED. Finally, the petitioner's Motion to Amend, Motion of June 5, 2000 [Doc. #24] is DENIED. The Clerk is directed to enter judgment and close this case.

In addition, the court determines that the petition presents no question of substance for appellate review, and that the petitioner has failed to make a "substantial showing" of the denial of a federal right. See Barefoot v. Estelle, 463 U.S. 880, 893 (1983); Rodriguez v. Scully, 905 F.2d 24 (1990). Accordingly, a certificate of appealability will not issue.

SO ORDERED this 28th day of February, 2001, at Hartford, Connecticut.

_____/s/_____

Christopher F. Droney
United States District Judge